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Case No. 08-319

Supreme Court, U.S.
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In the Supreme Court of the United States

HARENDA ENTERPRISES, INC.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

SECTION TITLE		Page No.
TABLE OF CONTENTS		i
TABLE OF CITED AUTHORITIES		iii
ARGUMENT		1
I.	THE WISCONSIN SUPREME COURT CONSTRUED FEDERAL REGULATIONS WITH NATIONAL APPLICATION.....	1
II.	THE TESTING PROTOCOL ISSUE IS A PART AND PARCEL OF THE *SAN DIEGO GAS* APPEAL	4
III.	THE ARGUMENT THAT THIS COURT SHOULD DECLINE TO HEAR THE CASE BECAUSE THE EPA CAN CORRECT ITS OWN RULE WOULD ALLOW AGENCIES TO RUN ROUGHSHOD OVER THE DEMOCRATIC PROCESS.	6
IV.	ARGUMENT RESPECTING THE SUBSTANCE OF THE REGULATORY INTERPRETATION ISSUE IS PREMATURE	8

SECTION TITLE		Page No.
V.	ARGUMENT RESPECTING THE SUBSTANCE OF THE DUE PROCESS ISSUE IS PREMATURE.....	9
VI.	HEI DID NOT WAIVE THE ARGUMENT CONCERNING REPRESENTATIVE SAMPLING	10
CONCLUSION		12

TABLE OF CITED AUTHORITIES

Cited Authority	Page No.
Cases	
Boynton v. Commonwealth of Virginia, 264 U.S. 454, 81 S.Ct. 182, 5 L.Ed.2d 206 (1960)	12
Deeds v. United States, 306 F.Supp. 348 (D. Mont. 1969)	3
Hoosier Casualty Company of Indianapolis, Ind. v. Fox, 102 F.Supp. 214 (N.D. Iowa 1952)	3
Lear, Incorporated v. Adkins, 395 U.S. 653, 89 S.Ct. 1902, 23 L.Ed.2d 610 (U.S. 1969)	11
MCI Telecommunications Corporation v. American Telephone and Telegraph Company, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)	7, 8
Motor Vehicle Manufacturers Association of the United States, Incorporated v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)	8
In re Nolan, 383 B.R. 391 (6th Cir. 2008)	3

Cited Authority	Page No.
United States v. Great Northern Railway Company, 343 U.S. 562, 72 S.Ct. 985, 96 L.Ed. 1142 (1952)	12
Verizon Communications Incorporated v. Federal Communications Commission, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002)	7
Yee v. City of Escondido, California, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992)	11, 12
Statutes	
Administrative Procedure Act, 5 U.S.C. §553 [Appx., Doc. 8]	3
Regulations	
Asbestos-Containing Materials in School Buildings: A Guidance Document ("Reference 5") [Appx., Doc. 23]	10
Interim Method of the Determination of Asbestos in Bulk Insulation Samples, appendix E, subpart E, 40 CFR part 763, section 1.7.2.1. [Appx., Doc. 6]	2-7, 10, 11
National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140, *et. seq.* [Appx., Doc. 5]	1, 2, 5, 7, 10

Cited Authority	Page No.
NR 447.02-.08; NR 447.13, Wisconsin Administrative Code [Appx., Doc. 10]	1, 2
NR 484.04(28), Wisconsin Administrative Code [Appx., Doc. 9]	2
U.S. Supreme Court Rules	
Rule 10	7, 8, 9
Rule 32.3	4
Other - EPA Publications	
Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 59, No. 3, January 5, 1994 [Appx., Doc. 11]	1-7, 10, 11
Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems, Federal Register, Vol. 60, pp. 65243-44, December 19, 1995 [Appx., Doc. 12]	1-7, 10, 11
Other – Secondary Sources	
16B C. Wright, A. Miller, and E. Cooper, Federal Practice & Procedure Juris.2d § 4022 (2008)	11

ARGUMENT

I. THE WISCONSIN SUPREME COURT CONSTRUED FEDERAL REGULATIONS WITH NATIONAL APPLICATION.

The State of Wisconsin ("the State") contends there is no federal question because the Supreme Court of Wisconsin was not construing the National Emission Standards For Hazardous Air Pollutants (NESHAP), 40 CFR §61.140, *et. seq.* [Appx., Doc. 5, pp. A-75 to A-100][1] Instead, the State contends the Supreme Court of Wisconsin construed NR 447, Wis. Admin. Code. Significantly, the State concedes that NR 447 is "based on a near identical federal set of administrative rules ...." [State's Br., p. 9] The State belies its own argument when it concedes "the Wisconsin Supreme Court used *EPA's clarifications* ... to construe the meaning of the rule addressing the proper method for measuring the percentage of asbestos in the multi-layer construction material only after finding the rule ambiguous as written." [State's Br., p. 12] [emphasis added]

The rules in NR 447 at issue in this petition are identical to the NESHAP but for non-substantive changes. The provisions of NR 447 that the State asserted Harenda Enterprises, Inc. (hereinafter "HEI") violated are virtually identical to the NESHAP. *Compare* NR 447.08(6) to 40 CFR §61.145(c); *and* NR 447.07 to 40 CFR §61.145(b); *and*

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[1] The references to "Appx." are to the Appendix to HEI's Petition For Writ of Certiorari filed on September 4, 2008.

NR 447.13(1) to 40 CFR §61.150. [Appx., Doc. 10, pp. A-126 to A-153; Appx., Doc. 5, pp. A-75 to A-100]

The federal issue involves the promulgation and interpretation of the Interim Method, appendix E, subpart E, 40 CFR part 763, section 1.7.2.1, which the State adopted in NR 484.04(28). [Appx., Doc. 9, pp. A-124 to A-125] Also, both the NR 447 regulations and the NESHAP expressly adopt the Interim Method. *See* NR 447.02(1) *and* 40 CFR §61.141. [Appx., *Id.*] One of the major federal issues the lower courts addressed was whether the asbestos test results upon which the State relied satisfied the Interim Method as adopted by 40 CFR §61.141 and NR 447.02(1).

The Interim Method is exclusively a federal regulation applicable in all states, that NR 484.04(28) adopted, and that the Supreme Court of Wisconsin construed. The Supreme Court of Wisconsin construed the Interim Method as interpreted by the federal Environmental Protection Agency (EPA) in the Clarifications.[2] The court recognized that the trial court "determined that the State satisfied its burden of demonstrating that there was ACM under [NR 447] and the relevant [Interim Method]." [Appx., Doc. 1, pp. A-10 to A-11]

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[2] The first EPA "clarification" is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal Register, Vol. 59, No. 3, January 5, 1994. [Appx., Doc. 11, pp. A-154 to A-158] The second "clarification" is titled "Asbestos NESHAP Clarification Regarding Analysis Of Multi-Layered Systems," and is published in the Federal Register, Vol. 60, pp. 65243-44, December 19, 1995. [Appx., Doc. 12, pp. A-159 to A-165]

It recognized that the Wisconsin Court of Appeals "determined that the State's interpretation of [the Interim Method], which was based upon the clarifications of the rule issued by the [EPA], was inconsistent with the plain language of the [Interim Method]." [Appx., Doc. 1, p. A-11] The Supreme Court of Wisconsin held the Clarifications did not violate the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. §553(b) (APA), citing exclusively federal case law decided under the APA. [Appx., Doc. 1, pp. A-30 to A-33] Accordingly, the State's argument is incorrect as a matter of fact and of law.

Equally incorrect is the State's argument that the Supreme Court of Wisconsin's decision is "exclusively a matter of state law," has only "precedential effect" in Wisconsin, and has "no precedential effect for federal courts." [State's Br., p. 9] While the decision is not binding on other state and federal courts, its decision is considered persuasive, and will certainly be cited as such throughout the nation. *See In re Nolan*, 383 B.R. 391, 396 (6th Cir. 2008); *Deeds v. U.S.*, 306 F.Supp. 348, 359 (D.C.Mont. 1969); *and Hoosier Cas. Co. of Indianapolis, Ind. v. Fox*, 102 F.Supp. 214, 233 (D.C. Ia. 1952).

II. THE TESTING PROTOCOL ISSUE IS A PART AND PARCEL OF THE *SAN DIEGO GAS* APPEAL.

The State contends "the issue regarding the proper method to be used in evaluating the multi-layered samples for the presence of asbestos, whether it be the evaluation of single layers or an averaging of the layers, is *not* before the [9th Circuit in the *San Diego Gas* case]." [State's Br., p. 11] The State references the Government's brief to the 9th Circuit in *San Diego Gas*, contending it does not include the single versus combined layer testing issue. The State seeks to lodge the Government's 9th Circuit brief in this Court under Rule 32.3.

A review of the 9th Circuit brief shows that the combined layer testing protocol of the Interim Method versus the single layer testing protocol of the Clarifications is a part and parcel of the Government's appeal. In addition to holding that the single layer testing protocol of the Clarifications could not serve as the basis of asbestos liability, the Southern District of California held in *San Diego Gas* that debris pile samples that did not contain all of the layers of the original material were not admissible because such samples violated the requirement in the Interim Method that samples contain all the layers of the original material. While the Government argues in its *San Diego Gas* brief that the Southern District of California erred in holding that debris pile/non-representative samples were not admissible as evidence, a part and parcel of the Government's argument is that, because the single layer testing method of the Clarifications is

permissible, non-representative debris pile samples are likewise permissible.

In the Clarifications, the Government argued, "EPA stated that a material is RACM if any one of its multiple layers, standing alone, contains 1% or more asbestos. The district court found that [the Clarifications] conflicted with the [combined layer testing protocol of the Interim Method] and therefore were not binding. The court found instead that the NESHAP demolition regulations only apply to a multi-layer material if the *average* asbestos content of the material exceeds 1%." [Govt. Br., p. 15] [emphasis original] "By effectively requiring the field personnel to testify that the samples they took contained all layers of the demolished material in precisely the same proportions as the original material," the Government complains, "the court's interpretation would make it difficult, if not impossible, to use debris samples as evidence in an asbestos NESHAP work practices prosecution." [Govt. Br., p. 26] [emphasis original]

The testing protocol issue is a part and parcel of the Government's argument in *San Diego Gas* that the debris pile samples are not required to be representative of the original material.

III. THE ARGUMENT THAT THIS COURT SHOULD DECLINE TO HEAR THE CASE BECAUSE THE EPA CAN CORRECT ITS OWN RULE WOULD ALLOW AGENCIES TO RUN ROUGHSHOD OVER THE DEMOCRATIC PROCESS.

The State argues "[t]he solution to the confusion caused by the EPA rule as written is the amendment of the rule, not review by this Court." [State's Br., p. 12] The State asserts that "even if this Court would accept review and subsequently rule in favor of Harenda's interpretation of the rule as written, the Court's decision's precedential effect could be quickly cut short by the EPA amending its rule in conformity with [the Clarifications]." [*Id.*]

This argument admits the truth of HEI's, the *San Diego Gas* court's, and the Wisconsin Court of Appeals' thesis that the Clarifications are unenforceable because they are substantively inconsistent with the Interim Method. The admission that the EPA could amend "its rule in conformity with" the Clarifications is antithetical to the State's central thesis that the Clarifications are not inconsistent with the Interim Method. If the State's central thesis that the Clarifications are merely a "guidance" that are consistent with the Interim Method were correct, there would be no need for the EPA to amend the Interim Method "in conformity with" the Clarifications.

Regardless, the State's argument misses the point. It is clear that, given the EPA's position that the Clarifications are consistent with the Interim

Method and that rulemaking is not necessary, the EPA has no intention of amending its rule to bring it "in conformity with" the Clarifications. Neither the EPA nor any other administrative agency will change a rule unless a court tells it to do so. In the second "clarification" dated December 19, 1995, the EPA stated that it "intends to amend the asbestos NESHAP in the near future to refer specifically to [the] procedures [contained in this clarification]." Given that the EPA has not attempted to amend the Interim Method in the 13 years that have ensued, the State's argument is disingenuous.

If there were any validity to the State's argument, then neither this Court nor any other court would accept a case for review of administrative action on an issue of national importance such as asbestos abatement. The court would simply "beg off" cases where the agency failed to observe administrative rulemaking since the agency could simply undertake rulemaking if it so chose. There would be no decisions by this Court or any court finding that an agency failed to properly rule-make, and federal, state and local agencies could run roughshod over the democratic process of notice and opportunity to be heard on substantive agency rules that affect a person's property and liberty interests.

This Court has repeatedly accepted cases for review under Rule 10 where the agency failed to rulemake, and other state and federal courts have passed on such agency failure. *See, e.g., Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002); *MCI*

Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); *and Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). It has never been a basis for this Court or any other court to deny review of agency action simply because the agency, at its own caprice and whim, could decide to change or not change the rule at issue. The State's argument is too far-reaching to require further comment.

IV. ARGUMENT RESPECTING THE SUBSTANCE OF THE REGULATORY INTERPRETATION ISSUE IS PREMATURE.

In Section IV. on pages 13-19 of its brief, the State essentially argues that the decision of the Supreme Court of Wisconsin in this case is the better rule of law because its reasoning is supposedly better than the reasoning of the *San Diego Gas* decision. By arguing that, as between these two diametrically opposing decisions, the Wisconsin decision is the superior one, the State is admitting that there are conflicting decisions on an issue of national importance -- asbestos abatement -- that "has not been, but should be, settled by this Court" within the meaning of Rule 10(c). It is further admitting that there are conflicting decisions that this Court should resolve under Rule 10(b).

Far from constituting a basis for this Court to deny certiorari, the State's argument actually supports issuance of the writ. By arguing the

substance of the case on a petition for a writ of certiorari, the State is getting ahead of itself. The issue in this petition is whether this Court should accept the case under the criteria set forth in Rule 10, not who should prevail on the substance if the Court does issue the writ. While HEI could provide ample reasons why the *San Diego Gas* decision is the better rule of law, it will not make that argument here, because it is premature.

V. ARGUMENT RESPECTING THE SUBSTANCE OF THE DUE PROCESS ISSUE IS PREMATURE.

The State misses the point when it argues that the Supreme Court of Wisconsin did not violate HEI's substantive due process rights when it arbitrarily accepted the State's positive test results and capriciously rejected HEI's negative test results without a rational basis for its holding. The issue at this stage is whether, given the national importance of the rules for asbestos abatement liability, this Court should accept this case for review to determine whether substantive due process requires a court to have a rational basis for whose test results to accept where, as here, there are dueling test results. That is, where the State's test results are positive for asbestos and the defendant's test results are negative for asbestos.

As pointed out in HEI's petition, the decision on this issue has significant importance for asbestos abatement on a national basis. As also pointed out in HEI's petition, the resolution of the issue whether any one positive "hit" for asbestos in testing by the

government is sufficient to establish liability where, as here, there are conflicting test results with no concomitant showing that the defendant's test results fail to comply with the NESHAP will have significant impact on asbestos abatement nationally. The State's attempt to argue the substantive issue concerning whether the Supreme Court of Wisconsin's decision actually constitutes a due process violation is premature.

VI. HEI DID NOT WAIVE THE ARGUMENT CONCERNING REPRESENTATIVE SAMPLING.

In its petition, HEI argued that this Court should grant certiorari, because the decision of the Supreme Court of Wisconsin in this case effectively wrote the representative sample requirement out of the Interim Method. The basis of this argument is that 1.7.2.1 through 1.7.2.4 of the Interim Method and Reference 5 require that, in addition to requiring that the investigator *test* all layers of material and combine the results, the investigator is required to *sample* all of the layers. In this case, the State admitted that applicable sampling regulations require the sampler to attempt to obtain all layers when taking wall samples. [R.44:72; R.44:141] The State contends that HEI waived this argument, because it supposedly raised it for the first time on appeal.

The State's argument is inconsistent with both the law and the facts. HEI's argument that the Clarifications violate the Interim Method because they write the representative sampling regulations

out of the Interim Method is a part and parcel of HEI's argument that the Clarifications violate the Interim Method because they allow single layer testing. Clearly, if the single layer testing of the Clarifications violates the Interim Method's requirement of combined layer testing, they likewise violate the Interim Method requirement that the samples be representative of all layers of the original material. Each argument has as its common thread that the single layer testing protocol of the Clarifications are inconsistent with, and are a substantive change to, the Interim Method. The arguments are "one in the same."

If these two arguments are not identical, they are at the very least closely related. Existing precedent provides that the Court may consider an argument that the petitioner may not have made in the lower court if the argument is "closely related" to an argument that the petitioner did make in the lower court. *See, e.g.*, 16B C. Wright, A. Miller, and E. Cooper, *Federal Practice & Procedure Juris.2d* § 4022 (2008), *citing Lear, Inc. v. Adkins*, 395 U.S. 653, 662 n. 10, 89 S.Ct. 1902, 1906-1907 n. 10, 23 L.Ed.2d 610 (1969); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 444 n. 3, 89 S.Ct. 601, 603 n. 3, 21 L.Ed.2d 658 (1969). A logical culmination of these various cases may be found in the more recent effort to distinguish between arguments and claims, finding it proper to allow new arguments to be presented to the Court so long as the underlying claim was presented to the state courts. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992).

This Court has held that an argument that was made for the first time on a motion for reconsideration in the lower court could be heard even though the lower tribunal denied the motion without opinion. *U.S. v. Great Northern Ry. Co.*, 343 U.S. 562, 568 n. 3, 72 S.Ct. 985, 990, 96 L.Ed. 1142 (1952). *See also Yee*, 503 U.S. at 534, 112 S. Ct. at 1532, 118 L.Ed.2d 153 (holding that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below"); *and Boynton v. Com. of Va.*, 364 U.S. 454, 456-457, 81 S.Ct. 182, 184, 5 L.Ed. 2d 206 (1960) (holding that all arguments closely related to plaintiff's principal discrimination claim could be heard even though not made in the court below). HEI did not waive any arguments that it seeks to have reviewed in this petition.

CONCLUSION

As indicated in HEI's petition, the national cost of asbestos abatement, and the undisputed increased cost asbestos abatement that will result from the Wisconsin Supreme Court's decision warrants that this Court grant certiorari and settle the federal issues involved.

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